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No. 77-10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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EXXON CORPORATION, *et al.*,
*Appellants,*

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
*Appellees.*

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On Appeal From The Court Of Appeals
Of Maryland

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## MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

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## BRIEF OF AMICI CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION.

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Champlin Petroleum Company, Cities Service Oil Company, Getty Refining and Marketing Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, The Standard Oil Company (of Ohio), Sunmark Industries, A Division of Sun Oil Company of Pennsylvania, Tenneco Oil Company and Tesoro Petroleum Corporation ("the amici group") hereby move, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief as *amici curiae*. The appellants have consented to the filing of such a brief. The appellee, through the Attor-

ney General of the State of Maryland, has refused consent.

As more fully set forth in the brief (*infra,* pp. 2-6), current and future business operations of each member of the amici group are directly, substantially and adversely affected by the decision of the court below. That decision will force many members of the group to divest themselves of existing company-operated retail service station outlets for their petroleum products, and will prevent them from opening such new outlets.[1]

Unlike appellants, some members of the amici group do not now market petroleum products in Maryland.[2] One member of the amici group, Koch Refining Company, has only company-operated retail outlets in other states, and has never had any dealer-operated retail outlets. These members of the amici group are effectively precluded from entering the Maryland retail market because the Maryland statute at issue in

[1] Members of the amici group which market petroleum products in Maryland through company-operated retail service stations and which would be subject to the divestiture provisions of the Maryland statute include: Cities Service Oil Company, Getty Refining and Marketing Company, The Standard Oil Company (of Ohio) (through a subsidiary, BP Oil Inc.), and Sunmark Industries, A Division of Sun Oil of Pennsylvania.

Tenneco Oil Company sells to 61 wholesale customers in Maryland, but has no retail outlets at all in Maryland. Thus, Tenneco would not be subject to the divestiture provisions of the Maryland statute, but its ability to sell to wholesalers in Maryland might be affected by the uniform allocation and pricing provisions of the statute, which apply to the wholesalers to whom Tenneco sells petroleum products.

[2] Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (one outlet of a subsidiary is operated under an exclusive contract with Memco Stores).



this case prohibits company-operated service stations, which are the only effective means of competition in a field dominated by brand names and established consumer loyalties. Thus, members of the amici group can present a different perspective from appellants on the effect of the Maryland statute on interstate commerce in petroleum products, because they, unlike appellants, will be precluded from entering the Maryland retail market.

The Maryland statute at issue in this case presents important questions in regard to the degree to which it has been, or should be, pre-empted by the Commerce Clause, U.S. Constit. Art. I, § 8, cl. 3, and by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b). An additional ground for pre-emption of the Maryland statute is presented by the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* In view of the national importance of assuring a steady, fairly and fully apportioned supply of petroleum products, the amici group believes that this latter question (discussed in the brief, *infra,* pp. 18-26) should be—and has not been—fully presented to this Court.

The full range of questions presented by this case are of great significance because they have potential to change fundamental principles of law in regard to the Commerce Clause, the federal Emergency Petroleum Allocation Act and the Robinson-Patman Price Discrimination Act. The resolution of these questions will not only affect these important areas of federal law, but will also have direct and important consequences for existing or contemplated legislation in some thirty-four states other than Maryland. Therefore, this Court

should be presented with a diverse, comprehensive discussion of the ramifications of these important questions.

For these reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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### OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (App. A, pp. 1a-44a)[1] is officially reported at 279 Md.

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[1] References to appendices are to those contained in the joint

410, and also at 370 A.2d 1102. A supplemental opinion of the Court of Appeals on motions for reconsideration and stay of judgment is officially reported at 279 Md. 456. (App. B, pp. 45a-48a.) The opinion of the Circuit Court, Anne Arundel County (App. C, pp. 49a-51a) granting motions for partial judgment is not officially reported, but is unofficially reported at 1976-1 Trade Cases (CCH), ¶ 60,704 (Md. Cir. Ct., 1975). The opinion of the Circuit Court on the remaining issues (App. D, pp. 53a-134a) is not officially reported.

## JURISDICTION

The judgment of the Maryland Court of Appeals was entered April 13, 1977. A petition for reconsideration and for stay of the mandate was denied by that court on April 13, 1977. (App. B, pp. 45a-48a.) Notices of appeal were timely filed with the clerk of the Maryland Court of Appeals and with the clerk of the Circuit Court for Anne Arundel County, the court possessed of the record, pursuant to Rule 877 of the Maryland Rules of Procedure, Md. Ann. Code (1957) (1977 Repl. Vol.), and are reprinted in App. E, pp. 135a-154a. The Exxon Corporation and Phillips Petroleum Company filed a Jurisdictional Statement on July 1, 1977. Jurisdiction is invoked under 28 U.S.C. § 1257(2).

## INTEREST OF AMICI CURIAE

*Amici curiae* are a group of petroleum companies, consisting of Champlin Petroleum Company, Cities

Appendix filed by Exxon Corporation, the Phillips Petroleum Company, Gulf Oil Corporation, Continental Oil Company and its subsidiary, Kayo Oil Company, Shell Oil Company, Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation accompanying their jurisdictional statements.



Service Oil Company, Getty Refining and Marketing Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, The Standard Oil Company (of Ohio), Sunmark Industries, A Division of Sun Oil Company of Pennsylvania, Tenneco Oil Company and Tesoro Petroleum Corporation. Some members of the *amici curiae* group are engaged in petroleum production, refining and marketing;[2] others are engaged only in petroleum refining and marketing.[3]

None of the members of the amici group is engaged in petroleum production or refining in Maryland.[4] Some of the amici group were, and are, engaged in marketing petroleum products in Maryland through retail service

[2] Champlin Petroleum Company (wholesale marketing in the southwest, southeast and eastern seaboard, retail marketing in the mid-continental states); Cities Service Oil Company (marketing in twenty-seven states); Kerr-McGee Corporation (marketing primarily in the midwest and southwest); Marathon Oil Company (wholesale marketing in the eastern states, retail marketing in six midwestern states); The Standard Oil Company (of Ohio) (marketing either directly or through subsidiaries in Ohio, Pennsylvania, Michigan, Kentucky, West Virginia, Indiana, New England and the Mid-Atlantic regions); Tenneco Oil Company (marketing primarily in the southeastern and Atlantic seaboard areas); Tesoro Petroleum Corporation (marketing in California, Connecticut, New Jersey, New York and Pennsylvania).

[3] Getty Refining and Marketing Company (marketing in twelve northeastern states under the "Getty" brand name and in the midwest under the "Skelly" brand name). Getty Oil Company, the parent of Getty Refining and Marketing Company, also engages in petroleum production. Koch Refining Company (marketing in 36 states through a subsidiary, Koch Marketing Company). Koch Industries, Inc., a parent company, also engages in petroleum production. Sunmark Industries, A Division of Sun Oil Company of Pennsylvania (marketing in the eastern two-thirds of the United States). Sun Oil Company of Pennsylvania engages in petroleum refining; a related company engages in petroleum production.

[4] There is not now, and never has been, any petroleum production or refining in Maryland. (App. A, p. 19a.)

stations.[5] Some of the amici group are not now engaged in retail marketing of petroleum products in Maryland.[6]

The Maryland statute[7] upheld by the court below directly affects each member of the amici group. That statute, *inter alia,* prohibits petroleum producers, refiners and wholesalers from opening or continuing to operate retail service stations operated with company personnel.

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[5] Members of the amici group currently marketing petroleum products in Maryland through retail service stations include:

Cities Service Oil Company: 60 retail service stations—34 company operated, 26 dealer operated.

Getty Refining and Marketing Company: 92 retail service stations—all dealer operated as of May 15, 1977.

The Standard Oil Company (of Ohio): BP Oil Inc., a subsidiary, has 72 retail service stations, 61 of which are company-operated, 11 of which are dealer operated. BP Oil Inc. also sells to 32 wholeale distributors, and 20 other retailers.

Sunmark Industries, A Division of Sun Oil of Pennsylvania: 264 retail service stations, 9 of which are company-operated, 255 of which are dealer operated. Sunmark expanded the number of company-operated stations in 1975-1976.

Tenneco Oil Company does not now have any retail service station outlets nor any branded operations in Maryland. Tenneco does sell petroleum products to 61 wholesalers in Maryland.

*See also* Pre-Trial Order, Circuit Court for Anne Arundel County, October, 1975, Tables A and B, at pp. 11-13 for 1974 data on petroleum marketing in Maryland.

[6] Companies which do not presently market petroleum products in Maryland include: Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (a subsidiary, Digas Company, operates one retail outlet in Baltimore under an exclusive contract with Memco Stores).

[7] Md. Ann. Code, Art. 56, § 157E (1972 Repl. Vol. 1976 Cum. Supp.), set forth at p. 3 of the Jurisdictional Statement.



Those companies in the amici group which are petroleum producers and refiners and do not presently market their products in Maryland[8] will be unable to enter and compete in the Maryland market because the Maryland statute forbids the opening of company-operated retail service stations, which are the most efficient, economic and competitive avenues for initial and continuing participation in the highly competitive petroleum products and gasoline retail field. Those companies which are petroleum producers and refiners and do presently market petroleum products in Maryland are prohibited from opening any new company-operated retail service stations and must divest existing company-operated retail service stations. No company can maintain or develop company-operated service stations as retail outlets to market petroleum products in Maryland as long as it also has a production or refining capacity.

The Maryland statute upheld by the court below also requires any company in the amici group which enters or remains in the Maryland petroleum retail market to allocate petroleum products uniformly to all retail service station dealers. Yet, Congress has established its own broad plan for allocating petroleum resources, the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* The Maryland statute also requires any company in the amici group which enters or remains in the Maryland petroleum retail market to grant any voluntary price allowances uniformly to all retail service station dealers throughout the state. Yet, the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b), permits price differentiations to be ex-

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[8] *See* n. 6, *supra.*

tended on a non-uniform and geographically limited basis. Thus, the Maryland statute imposes on the members of the amici group new or different requirements for doing business than those imposed by these two important federal statutes.

The Maryland statute upheld by the court below thus affects the scope, content, distribution method and pricing of the present and future busines operations in Maryland of all the members of the *amici curiae* group. Other states have adopted or are considering similar legislation. Thus, the decision of the court below could, because of its potential precedential value, have impact on the conduct of the business of the amici group in at least thirty-four jurisdictions other than Maryland. For these reasons, this brief is being filed to urge this Court to review the decision below.

## THE QUESTIONS ARE SUBSTANTIAL

The decision of the Maryland Court of Appeals, upholding a state law[9] prohibiting producers and refiners of petroleum products from opening or operating retail service stations in the State of Maryland operated by company personnel, and imposing restrictions on the distribution of petroleum to retail service station dealers,[10] presents novel and important questions which warrant review by this Court.[11]

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[9] Md. Ann. Code, Art. 56, § 157E (1972 Repl. Vol. 1976 Cum. Supp.).

[10] The statute requires every producer, refiner or wholesaler of petroleum products to extend all voluntary allowances uniformly, to supply all equipment rentals uniformly, and to distribute all gasoline and special fuels uniformly and on an equitable basis during periods of shortage to all retail service station dealers.

[11] The Maryland statute was challenged in the Circuit Court for Anne Arundel County on the basis of its repugnancy to the federal constitution, and that court held the statute unconstitutional. The Maryland Court of Appeals, the highest court of Maryland, after a challenge to the Maryland statute based on eight federal constitutional grounds (App. A, p. 4a-5a), held the statute in its entirety to be constitutional, and thus decided in favor of the validity of the statute. Consequently, the case falls within the jurisdictional statute. 28 U.S.C. § 1257(2).



Producers and refiners distribute petroleum products to the consuming public through both company-operated and independently run retail service stations. The Maryland Court of Appeals has upheld a state statute which eliminates one of these distribution methods, the company-operated retail service station. This decision will alter radically the structure of the petroleum industry, which has, until now, depended on both avenues of distribution.

The importance of the questions raised is magnified by the enactment of similar statutes in several states[12] and the extensive consideration being given related measures in 31 state legislatures.[13] If the decision below

[12] Delaware and the District of Columbia have adopted statutes which prohibit petroleum producers or refiners from operating retail stations and require prices and allowances to be uniform. Del. Code tit. 6, § 2905 (Cum. Supp. 1976); D.C. Law 1-123 (April 7, 1977). The Delaware statute is presently being challenged in the state courts. Florida enacted a law limiting the percentage of retail stations which could be company operated. Fla. Stat. Ann. § 526.151 (Supp. 1976) (held unconstitutional under the Florida Constitution in *Exxon Corp.* v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Florida, January 23, 1975)). California and Rhode Island have adopted statutes which require price allowances to be uniform. Cal. Bus. & Prof. Code § 21200 (Deering) (held unconstitutional under the federal constitution in *Shell Oil Co.* v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976); Rhode Island, R.I. Gen. Laws § 5-55-5 (Supp. 1976).

[13] Legislatures in the following states have been or are considering

is permitted to stand without review by this Court, it will serve as a precedent which will encourage the States to devise their own regulatory schemes restructuring the petroleum industry. Such regulatory schemes may vary from state to state, which will compound the likely serious disruption of interstate commerce in the petroleum commodities vital to the national economy. The interdependent economic complexities of this industry and the national interest in maintaining a reliable and efficient petroleum products supply system require that a decision of a state court sustaining such a novel and far-reaching reorganization of this industry, and the methods by which petroleum products are distributed, not be permitted to stand without plenary review by this Court.

The questions here presented are also substantial because the Maryland statute and decision below expand state power to regulate interstate commerce far beyond the limits previously established by this Court. Maryland has determined that the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, does not prevent a state from completely excluding company-operated retail outlets of interstate producers or refiners of petroleum products from the retail market within its borders. But, as this Court has recently said, "the Clause is a limit on state power. Defining that limit has been the continuing task of this Court." *Boston Stock Ex-*

related measures: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. California and Rhode Island, which have adopted statutes which require uniform price allowances, *see* n.12, *supra*, also have been considering legislation which requires divestiture of company-operated retail service stations.



*change* v. *State Tax Commission*, decided January 12, 1977. Whether a state may constitutionally so regulate, burden, and discriminate against interstate commerce in petroleum products should now be decided by this Court.

Plenary review of the decision below would ensure that such significant changes in the way in which interstate commerce in the petroleum industry is conducted are not decided on a state-by-state but rather on a national basis. The Commerce Clause of the United States Constitution gives to Congress the basic power to make laws "To regulate Commerce . . . among the several States. . . ." The Maryland statute requires interstate petroleum producers and refiners to distribute their products in a certain way in the State of Maryland: only through independent, retail service stations, with uniform voluntary allowances, uniform equipment rentals, and uniform apportionment of gasoline to Maryland retail dealers. Such legislation, which burdens and discriminates against interstate commerce, and which creates diversity instead of uniformity, conflicts with the power to regulate interstate commerce granted to the Congress.[14] "[W]here Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

The Maryland statute at issue in this case also conflicts with two specific federal statutes: the Emergency

[14] The Congress is now considering whether petroleum industry restructuring should be compelled. *See, e.g.*, S. 795, 95th Cong., 1st Sess., 123 Cong. Rec. S2974 (daily ed. Feb. 24, 1977); H.R. 3370, 95th Cong., 1st Sess., 123 Cong. Rec. H1074 (daily ed. Feb. 9, 1977); 9 Nat'l J. 170-173 (1977).

Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*, and the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b).

The federal Emergency Petroleum Allocation Act establishes a comprehensive and complex federal program to regulate the allocation of petroleum products. Paragraph F of the Maryland statute requires the uniform apportionment of petroleum products to all retail service station dealers during times of shortage. It thus intrudes upon the area regulated by the federal statute, and conflicts with it.

The court below, however, concluded that there was no conflict, and thus, that there was no pre-emption of the Maryland statute. Although all pre-emption problems require a careful weighing of respective federal and state interests, this need is even greater where the statutes respond to such a pressing national problem as the availability of scarce petroleum products. The determination of the court below that pre-emption is not operative here flies in the face of the express language of the Emergency Petroleum Allocation Act, § 755(b), and contravenes the policy expressed by Congress in that Act. Review by this Court is required, for, otherwise, the decision below would stand as a precedent which would encourage each state to impose its own restrictions on the distribution of petroleum products. Each state would be free to make its own balance of federal and state interests. Such action could seriously impair the effectiveness of the Emergency Petroleum Allocation Act.

The Maryland statute likewise conflicts in Paragraph D with Section 2(b) of the Robinson-Patman Act. That federal act permits the lowering of prices to meet



prices set by competitors. The Maryland statute requires petroleum producers and refiners to extend voluntary allowances on a uniform basis. It thus deprives petroleum refiners and producers of the absolute right, granted by Section 2(b) of the Robinson-Patman Act, to make a good faith discrimination in price between purchasers where necessary to meet equally low prices set by competitors.

In order to legitimize the Maryland statute, the court below selected between conflicting lower federal court decisions to hold that the Section 2(b) "meeting competition" defense was available to a supplier only when the discriminatory price is offered to a buyer in response to an equally low price offered to that same buyer by a competitor of the supplier. Relying on this interpretation of Section 2(b), the court below concluded that the Maryland statute did not conflict with —and was not pre-empted by—the Robinson-Patman Act, because the Section 2(b) defense was not applicable in the circumstance regulated by the Maryland statutes.

Resolution of the important question of the circumstances in which the Section 2(b) defense is available should not be made by a state court selecting between two competing interpretations by lower federal courts and in a manner contrary to the views of the two administrative agencies charged with enforcement of the statute. Rather, this important question, which this Court has specifically left open, *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512, n.7 (1963), should be resolved only by plenary review by this Court.

These questions are developed more fully in the remaining portion of this brief.

## I.

## THE MARYLAND STATUTE IS INVALID UNDER THE COMMERCE CLAUSE

Paragraphs B and C of the Maryland statute prohibit refiners or producers of petroleum products from operating retail service outlets. Because there is no refining or producing of petroleum products in Maryland (App. A, p. 19a), the statute creates a protectionist barrier insulating local retail service station dealers from competition with company-operated retail stations of interstate producers or refiners.

The court below determined that the Commerce Clause was no bar to this state action. It concluded that the statute was not discriminatory, and found a legitimate local interest in the expressed purpose of the statute "to preserve competition within the retail gasoline marketing industry in Maryland" (App. A, p. 19a) which, in its view, outweighed any potential burden on interstate commerce. Yet (1) the statute clearly discriminates against interstate petroleum producers and refiners who market petroleum through company-operated retail outlets, (2) it substantially burdens interstate commerce, (3) any legitimate local interest is outweighed by the national interest in an unimpeded interstate market for petroleum products and in uniform regulation of the petroleum supply system, and (4) less restrictive alternatives are available to the State. So far-reaching a challenge as that posed by the Maryland statute and the decision below to the historic scope of the Commerce Clause and the national economy it has nurtured and sustained should not be allowed to stand without full review by this Court.



### A. The End To Which The Maryland Statute Is Aimed Is Invalid Under The Commerce Clause.

The Maryland statute discriminates against interstate commerce by excluding interstate petroleum producers and refiners from the Maryland retail service station market. At least since *Cooley* v. *Board of Wardens,* 12 Howard 299 (1851), it has been clear that the Commerce Clause was not only a grant of authority to the Congress but "by its own force created an area of trade free from interference by the States." *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946); *Great Atlantic & Pacific Tea Co.* v. *Cottrell.* 424 U.S. 366, 370-371 (1976). Although the States are not precluded from protecting their citizens in matters of legitimate local concern even where interstate commerce is affected, the Commerce Clause "forbids discrimination" against interstate commerce "whether forthright or ingenious." *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455 (1940). *See South Carolina State Hwy. Dept.* v. *Barnwell Bros.,* 303 U.S. 177, 185 (1938); *H.P. Hood & Sons* v. *Du-Mond,* 336 U.S. 525, 535 (1949).

This Court is not bound by the expressed purpose of the state legislation in its determination of the legitimacy of the local interest served by the statute. *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 354 (1951). The real purpose of the Act was stated succinctly by the trial court upon review of all the evidence: "the entire bill is designed to benefit one class of merchants to the detriment of another." (App. D, p. 131a.) [15] This

[15] Gasoline marketing divestiture legislation has been promoted in the States primarily by independent retail gasoline dealers' associations. Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment,* 28 Vand. L. Rev. 1277, 1279, 1307 (1975).

Court has never held legitimate the protection of a State's own citizens, in this case Maryland's independent retail service station dealers, from the "burden of economic competition with the citizens of other States," *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 821 (1976) (Brennan, J., dissenting), here, the company-operated retail outlets of interstate petroleum producers and refiners.[16] Any other rule "would invite a multiplication of preferential trade areas destructive" of the free trade and unified national economy which the Commerce Clause protects. *Dean Milk Co.* v. *Madison, supra,* 340 U.S. at 356. This is exactly what the Maryland statute has established.

Nor can even its expressed purpose sustain the Maryland statute when it conflicts with the Commerce Clause. No State may strike out on its own to slay the dragon of "big oil" with the sword of divestiture. A viable national economy depends too heavily on its petroleum supply system to permit fragmented state-by-state redesign of the petroleum distribution system. If problems of competition in the petroleum industry require industry restructuring, the task "may justly be said to be of such a nature as to require exclusive legislation by Congress."[17] *Cooley* v. *Board of Wardens, supra,* 53 Howard at 319. *See Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 351 (1939).

[16] *See Dean Milk Co.* v. *Madison, supra,* 340 U.S. at 354, where this Court held that "an economic barrier protecting a major local industry against competition from without the State" is prohibited by the Commerce Clause.

[17] The necessity for *national* responses to problems of petroleum industry competition has been recognized by the Senate Committee on the Judiciary. In a recent report, the Committee recognized the national interest in the structure and marketing operations of the petroleum industry, noting that vertical divestiture proposals raised fundamental social questions which "'must be resolved either by Congress or the judicial system.'" S. Rep. No. 94-1005, 94th Cong., 2d Sess. 3, 6 (1976). The Committee said also that "the Nation has a vital stake in the conditions under which the outputs of the petroleum industry go to market." *Id.* at 3.



**B. Maryland's Regulatory Approach Is Not Reasonably Adapted To Its Putative End—The Substantial Burden On Interstate Commerce Imposed By The Maryland Statute Outweighs Any Local Benefits. And Less Restrictive Alternatives Are Available.**

Even if the Maryland statute were aimed at the legitimate end of preserving retail gasoline marketing competition, as the court below concluded, the approach taken in the Maryland statute is not appropriate to this end. Although this Court normally will leave to the legislative body questions of the "reasonableness, wisdom and propriety" of a regulatory scheme, *South Carolina Hwy. Dept.* v. *Barnwell Bros., supra,* 303 U.S. at 191, where interstate commerce is affected, it must be satisfied that the "means of regulation chosen are reasonably adapted to the end sought." *Id.* at 190. *See Milk Control Board* v. *Eisenberg Farm Products, supra,* 306 U.S. at 352. The record indicates that the statute is, for example, anticompetitive in its exclusion of independent refiner-marketers (App. A, p. 15a), and will adversely affect price competition. (App. D, p. 130a.)[18]

The decision below also demands review by this Court because it upholds a statute which appears to

[18] The Maryland trial court found that not only was there "not . . . demonstrated a real and substantial relation to the object sought to be attained by the means selected," but that in reality "the evidence . . . . indicates that the statute is inversely related to the public welfare." (App. D, p. 131a-132a.)

contravene this Court's prohibition against the imposition of undue burdens on interstate commerce by state legislatures. The Maryland statute will directly affect the interstate flow not only of petroleum products but also of capital, even though the court below concluded that the "Act merely regulates a wholly intrastate activity." (App. A, p. 18a.) Some interstate petroleum producers and refiners will ship less gasoline into Maryland if they are not permitted to use company-operated retail outlets. Some interstate petroleum producers and refiners will invest less capital in Maryland if these profitable enterprises are prohibited. Outside capital may also be harder (and more expensive) to obtain if profitable marketing outlets of interstate suppliers are curtailed. Oil companies not presently engaged in Maryland activities will be discouraged from entering the Maryland market if they cannot operate the economically attractive retail outlets which are essential to their ability to compete in that market. Partially integrated private brand marketers may have to withdraw from the Maryland market. Private brand marketers may be unable to "backward integrate" to create a competitive producing or refining capacity. This is hardly the "slight burden" on interstate commerce found acceptable by the court below. (App. A, p. 24a.)

This disruption of interstate commerce will be compounded if other states are encouraged by Maryland's successful exercise of the new-found power over the distribution system for petroleum products. Until now, the states have not been permitted by this Court to impose such substantial burdens on the national commerce in the absence of countervailing local requirements.



*Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* 424 U.S. at 373; *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Even if it were found that the Maryland statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it cannot be upheld because "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142. *See Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1960). Determining the extent of the burden on interstate commerce that will be tolerated requires this Court to balance Maryland's interest against "the overiding requirement of freedom for the national commerce," *Freeman* v. *Hewit, supra,* 329 U.S. at 253, with " 'the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities.' *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)." *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* 424 U.S. at 372 (footnote omitted).[19]

Here, as in *Dean Milk Co.* v. *Madison, supra,* 340 U.S. at 354, the local interest could be served as well by the use of alternatives less burdensome to interstate commerce, a factor entirely ignored by the court below. The Maryland legislature's concern that vertically integrated oil companies will favor their company-operated retail outlets in time of shortage should

[19] Less weight is given to the local interest in the balancing process when that interest is purely economic in nature than when it is related to health and safety. *See H. P. Hood & Sons* v. *Dumond, supra,* 336 U.S. at 533.

be obviated by operation of the federal Emergency Petroleum Allocation Act [20] and its penal sanctions.[21] Federal and Maryland antitrust laws make criminal sanctions available to the state as well as equitable and civil remedies to protect against anticompetitive activities. The Maryland Gasoline Products Marketing Act, Md. Com. Law Code Ann. § 11-304(c), (App. F, pp. 155a-161a), further protects against arbitrary termination of dealer operations. If these measures are not adequate, the legislature could fashion less draconian remedies which do not so substantially burden and disrupt interstate commerce.[22]

## II.

### PARAGRAPH F OF THE MARYLAND STATUTE IS INCONSISTENT WITH, AND THEREFORE PRE-EMPTED BY, THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.[23]

Congress has established a nationwide program for the allocation of scarce petroleum supplies. Whether this comprehensive federal petroleum allocation program pre-empts state legislation is a question that

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[20] 15 U.S.C. § 751-760 (Supp. V 1975).

[21] *Id.* at § 754.

[22] *See, e.g.*, Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1331-1334 (1975) (proposed predatory pricing amendment).

[23] U.S. Const. Art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."



should be resolved by plenary review by this Court of the decision below.

In the fall of 1973, shortages of all types of petroleum products created severe domestic and international difficulties. After thorough deliberation, Congress determined that the problems caused by the oil shortage "jeopardize the *normal flow of commerce* and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government." 15 U.S.C. § 751(a)(3) (emphasis added). Accordingly, Congress adopted the Emergency Petroleum Allocation Act of 1973 ("EPAA"),[24] which required the President to develop, in accordance with guidelines established by Congress, a comprehensive program to regulate the allocation of petroleum during times of shortage.[25]

Thereafter, Maryland passed the present statute which also deals with the allocation of petroleum-based fuel. It provides:

> "Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." Md. Ann. Code, Art. 56, § 157E(F).

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[24] Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751-760). In 1975, the life of the EPAA was extended to 1981 by the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871.

[25] The regulations have been adopted, and may be found in 10 C.F.R. § 211.1-§ 211.225.

Although the Maryland statute deals with precisely the same subject matter that is comprehensively treated by the federal act and regulations, the Maryland Court of Appeals held that the Maryland statute did not necessarily conflict with any specific federal regulation, and thus that it was not pre-empted by virtue of the Supremacy Clause of the United States Constitution. (App. A, pp. 31a-32a.) This decision, which permits a state to enter an area of great national importance, and one that has been so thoroughly regulated by the federal government, should not be permitted to stand without the full consideration of this Court.

The approach of the Maryland Court of Appeals to the problem of pre-emption incorrectly resolves the difficulties posed when federal and state laws regulate the same subject. The Maryland Court considered only the question whether there was direct conflict between the state statute and the federal regulations. This Court has stated, however, that federal law may pre-empt state legislation even where there is no specific conflict. *Campbell* v. *Hussey,* 368 U.S. 297, 300 (1961). In a pre-emption case, a court's "primary function is to determine whether, under the circumstances of [a] particular case, [a state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) (footnote omitted).

**A. Congress Has Occupied The Field.**

The present case is a ready example of this Court's observation that "it is where there is in existence a pervasive and comprehensive scheme of federal regulation that pre-emption follows in order to fulfill the



federal statutory purposes." *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 139 (1973). The EPAA and the regulations issued under it clearly occupy the entire area relating to the allocation of petroleum products. The regulations comprehensively regulate all aspects of the allocation of all forms of petroleum, 10 C.F.R. §§ 211.1-211.225, and explicitly cover the allocation of petroleum products to retail service station dealers. 10 C.F.R. § 211.106. Thus, the federal law expressly deals with the area covered by the state law.

The federal allocation program is the result of a complex balancing of competing political, economic, social and regional interests. The EPAA required the President in establishing the allocation program, to accommodate "to the maximum extent practicable," nine important objectives. 15 U.S.C. § 753(b)(1).[26]

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[26] As described by the House Committee, "Subsection (b) requires that to the extent practicable the regulation under subsection (a) provide for protection of public health, safety, and welfare, and the national defense; maintenance of all public services; maintenance of agricultural operations; preservation of an economically sound and competitive petroleum industry (including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, nonbranded independent marketers, and branded independent marketers); equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry (including independent refiners, nonbranded independent marketers, branded independent marketers), and among all classes of users; economic efficiency; and minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." H.R. Rep. No. 531, 93d Cong., 1st Sess. 17 (1973). The conference committee added to the final bill the additional objectives of allocation of crude oil to refineries

The conference committee recognized, however, "that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another. . . . This qualification is intended to give the President administrative flexibility in marshalling short supplies and equitably assigning them to particular needs." H.R. Rep. No. 628, 93d Cong., 1st Sess. 12 (1973).

The complex and finely-tuned nature of the federal allocation program has been recognized by the courts. In *Air Transport Association of America* v. *FEO,* 520 F.2d 1339, 1342 (Em. Ct. App. 1975), the Temporary Emergency Court of Appeals held that the section "dealing with equitable distribution of crude oil at equitable prices was only one of nine separate objectives which Congress directed that the regulations should provide, and that the balancing of all objectives is required 'to effectuate maximum achievement of their competing interests.' " Likewise, in *Condor Operating Co.* v. *Sawhill,* 514 F.2d 351, 359 (Em. Ct. App.), *cert. denied,* 421 U.S. 976 (1975), the court stated that "Exercising of the administrative authority and the accomplishment of purposes enumerated by Congress under the recognized emergency conditions are exceedingly complicated undertakings."

The broad and complex nature of the regulations issued pursuant to the EPAA strongly suggests that any effort by a state to duplicate or supplement the national allocation effort will inevitably conflict with the federal program. Regardless of how careful the state might be to avoid interference, the intricate na-

to permit full operation and allocation of petroleum products to permit further exploration for fuel. H.R. Rep. No. 628, 93d Cong., 1st Sess. 24 (1973).



ture of the regulatory scheme and the necessity to balance competing national objectives and competing private interests precludes dual regulation. Since a state cannot anticipate the balance between the competing factors that the federal government might make in its enforcement efforts, whatever action the state could take to enforce Paragraph F would have a disruptive impact on the administration of the federal plan.

The EPAA is an instance where a federal act "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . ." *Rice* v. *Sante Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The House Committee reported the bill with the assertion that "the basis and need for *Federal intervention* in the market to order mandatory allocation of certain fuels is well established." H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1975) (emphasis added). Petroleum shortages are a nationwide problem that can be avoided or ameliorated only on a national basis. The choice of a method to allocate this scarce resource is permeated with policy considerations of both national and international importance. The federal regulations issued pursuant to the EPAA do establish a limited but significant role for the States to play in the allocation process. 10 C.F.R. § 211.15, § 211.17.[27] Since the regulations specifically define the state role, no other role appears to be contemplated.

[27] Section 211.15 provides for the establishment of state offices of petroleum allocation. Section 211.17 creates a state "set-aside" system to "be utilized by the State office to meet hardship and emergency requirements of all wholesale purchaser-consumers and end-users within that state from the state set-aside volumes . . ."

**B. The Maryland Court of Appeals Incorrectly Determined That The Maryland Statute Was Not Pre-empted By the Federal Emergency Petroleum Allocation Act.**

The Maryland Court of Appeals dealt with the problem arising under Paragraph F by relying on 15 U.S.C. § 755(b), which reads as follows:

> The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any state or local government if such provision is in conflict with such regulation or any such order.

The court below held that this provision indicates congressional intent not to pre-empt a state allocation program unless there is an actual conflict between the state statute and a specific federal regulation. (App. A, p. 30a.)

There is no evidence, however, that this provision was designed to narrow in any way the usual scope of federal pre-emption. The language of Section 755(b) itself is phrased in affirmative terms. It states that the Act is intended to be pre-emptive. There are no explicit terms that indicate an intent to permit a state program that would otherwise be precluded. Moreover, the legislative history of the EPAA provides no support for the Maryland court's conclusion. Congress has nowhere indicated that states are to be allowed to pursue their own petroleum allocation programs.

It appears that Section 755(b) was designed solely to emphasize the need for federal supremacy in the complex area of petroleum allocation. The House report stated that the provision was designed to "pre-



empt state allocation *programs* which conflict with the national allocation scheme contemplated in this bill." H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1973) (emphasis added). It would be anomalous if this congressional expression of pre-emptive intent were transformed into precisely the opposite.

Even if the state court were correct in its interpretation of the pre-emption clause of the EPAA, it is far from clear that there is no specific conflict between the EPAA and Paragraph F of the Maryland Act. The court below attempted to resolve the apparent differences in the two laws by stating that the Maryland comptroller, who is charged with the administration of the state program, *might* construe the Maryland statute consistently with the federal regulations. The court did not, however, decide that the statute required the comptroller to do so. (App. A, p. 32a.) The statutory mandate of Paragraph F is so broad that the comptroller is left free to take a wide range of actions, any one of which may frustrate the purposes of the federal program.

Even if the regulations issued by the comptroller were consistent with the federal regulations, the federal and state methods of enforcement of the two acts and regulations may differ and create conflicting results. This Court has stated in the labor law context that a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union,* 346 U.S. 485, 490-491 (1953). As this Court has also said, "Administration is more than a means of regulation; administration is regulation." *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 243 (1959). A dual

system of petroleum allocation administration will inevitably lead to conflicting regulation and thereby frustrate the federal purpose.

The process by which the nation's scarce petroleum resources are allocated is of critical importance to the nation as a whole. If states participate in this process on the basis of their own statutory directives, the coordination and carefully constructed balance of the federal program will be impaired. *Cf. Pennsylvania* v. *Nelson,* 350 U.S. 497, 509 (1956); *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 638-639 (1973). Before the states are permitted to improvise their own role in dealing with this important national problem, this Court should, by plenary review of the decision below, clearly establish the extent to which a state may regulate petroleum allocation when Congress itself has established a plan to do so.

## III.

### THE MARYLAND COURT OF APPEALS' DETERMINATION OF THE SCOPE OF SECTION 2(b) OF THE ROBINSON-PATMAN ACT AND OF THE COMPATIBILITY OF THAT ACT WITH PARAGRAPH D OF THE MARYLAND STATUTE RAISES IMPORTANT QUESTIONS WHICH WARRANT REVIEW BY THIS COURT.

Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), provides that a seller can rebut a *prima facie* case of unlawful price discrimination among purchasers in violation of Section 2(a) of the Act [28] by

[28] Section 2(a) provides, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 15 U.S.C. § 13(a).



showing that "his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . ." This Section 2(b) "meeting competition" defense is available and is absolute, irrespective of any adverse effect on competition caused by the price discrimination. *Standard Oil Co.* v. *FTC,* 340 U.S. 231, 241, 246-247 (1951).

Paragraph D of the Maryland statute provides that

> "Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

The Maryland Court of Appeals construed "voluntary allowances" to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." (App. A, p. 35a.)

Thus, the Maryland Act makes "voluntary allowances" or price discriminations a state-wide matter. The Robinson-Patman Act permits selective price discrimination, when that differentiation is made in good faith to meet an equally low price of a competitor. The two acts thus appear to conflict.[29]

[29] The Circuit Court for Anne Arundel County found this con-

The court below concluded there was no conflict. (App. A, p. 40a.) It reached this result by adopting one (and the minority) of two conflicting lower federal court views of the circumstance in which the "meeting competition" defense is available, *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955), *reversed on other grounds,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957) (App. A, p. 37a, and p. 39a-40a.) In that case, the federal district court concluded that Section 2(b) permitted a seller to offer a buyer a lower price only when that particular buyer had been offered an equally low price by a competitor of the seller. *Id.* at 421. The court below held that because it had construed "voluntary allowances" to mean price reductions extended to enable a dealer to meet the lower price of a competing retail dealer, "there is no conflict between Paragraph D and § 2(b) . . . . Paragraph D of the state Act encompasses only the situation where temporary price reductions are given to a dealer [buyer] to meet the lower price of a *competing dealer* [buyer] and, in our view, § 2(b) of the federal Act does not extend to that situation." (App. A, p. 40a; emphasis in the original.) On this basis, the court below reached its conclusion that "there is no conflict between Paragraph D and § 2(b) of the . . . Robinson-Patman Act." (App. A, p. 40a.)

*Enterprise Industries* is explicitly contradicted by a decision of the United States Court of Appeals for the Seventh Circuit, *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana),* 466 F.2d 1163, 1175 (7th Cir. 1972),[30]

flict so self-evident that it granted a motion made by the present appellants for summary judgment on this issue. (App. C, p. 51a.)

[30] The holding in *Enterprise Industries* v. *Texas Co., supra,* is also implicitly contradicted by the Court of Appeals for the Tenth



by the Federal Trade Commission's interpretation of Section 2(b), and by the Department of Justice's interpretation of Section 2(b). In *Bargain Car Wash,* the Seventh Circuit, in an opinion written by the late Mr. Justice Clark, sitting by designation, and concurred in by now Mr. Justice Stevens, held that the Section 2(b) defense is available when a seller offers a lower price to a buyer to meet the equally low price offered by a competitor of the seller to its buyer. *Id.* at 1175. The Federal Trade Commission, which had once embraced the *Enterprise* doctrine,[31] has abandoned that position,[32] and has concluded that Section 2(b) is available when a seller is offering a buyer a lower price to meet the wholesale price offered by another seller to its buyer or is meeting the competition of an integrated refiner marketer.[33] The Department of Justice has con-

Circuit in *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-998 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) (Section 2(b) defense available when petroleum supplier lowers price and second supplier also lowers price to prevent losing retail customer because competition in prices existed and suppliers were at same functional level), and by the Court of Appeals for the Ninth Circuit in *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) (dictum that Section 2(b) defense was not foreclosed when competing petroleum supplier reduces price to retail dealer). *See also Bunty* v. *Shell Oil Co.*, 1972 Trade Cases (CCH) ¶ 74,252 (D. Nev. 1972) (price differences offered competitive dealers in the same area resulted from good faith effort to meet prices offered by Shell's competitors to their dealers).

[31] *Hearings on Gasoline Price War in New Jersey Before a Subcommittee of the Senate Select Committee on Small Business,* 84th Cong., 1st Sess., pt. 2, at 450-451 (1955).

[32] *The Federal Trade Commission's Report on Anti-competitive Practices in the Marketing of Gasoline,* 3 Trade Reg. Rep. (CCH) ¶ 10,373, at 18,245 (1967).

[33] *Id.* "Consequently, we are of the opinion that a price reduction

curred in the Seventh Circuit's interpretation of Section 2(b), and has affirmed the Federal Trade Commission's position. *See* Department of Justice, *Report on The Robinson-Patman Act* 94 (1977). As this court has stated, it is a "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367, 381 (1969).

This Court has specifically left open the question of the circumstances in which the "meeting competition" defense of Section 2(b) will be available to a seller if the seller's discriminatory price cut to its dealer is responsive to a price cut made by a competitor of a seller to its own dealer.[34] *FTC* v. *Sun Oil Co.,* 371 U.S. 505, 512, n.7, and 529, n.19 (1963). The Court should not now permit that important question, on which there is a conflict in the lower federal courts, to be resolved by a state court without full plenary review.[35]

As construed by the court below, Paragraph D of the Maryland statute eliminates a seller's right to invoke Section 2(b) of the Robinson-Patman Act when

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by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer."

[34] It is true, of course, that the Section 2(b) defense is not available where the seller's price discrimination to his buyer is in response to price cuts generated initially and solely at the buyer's level. *FTC* v. *Sun Oil Co.,* 371 U.S. 505 (1963).

[35] This Court has previously characterized a question about "the scope and application of the § 2(b) defense" as "difficult and important." *FTC* v. *Sun Oil Co., supra,* 371 U.S. at 506.



a seller reduces a price to buyers to meet the equally low price offered by a competitor of the seller to a buyer. The decision thus narrows the scope of the Section 2(b) exemption and exposes a seller to liability under Section 2(a). This change in the scope of Section 2(b), an exemption this Court has considered an integral and essential element in the congressional plan to promote overall price competition and avoid price inflexibility, *see Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951), frustrates this congressional plan by prohibiting price discrimination even in a circumstance where Congress deemed it desirable.

Even if the court below were correct in its conclusion that Section 2(b) is available only in the limited circumstance where a competitor of the seller has offered a particular buyer a lower price, Paragraph D of the Maryland Act would still conflict with the Robinson-Patman Act and be pre-empted by it.

(1) The Maryland Act requires that all price differentials be uniformly extended to all service station dealers.[36] Yet this Court has held that Section 2(b) does not require uniform price reductions.[37] In fact,

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[36] "Under Paragraph D if one dealer gets a voluntary allowance or rebate, all Maryland dealers of that brand of product will get the same allowance." Defendants' Memorandum in Support of Their Response and Opposition to Plaintiffs' Motions for Summary Judgment, p. 16.

[37] In *Standard Oil Co.* v. *FTC, supra,* 340 U.S. at 250, this Court stated: "There is, on the other hand, plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." The *Standard Oil* decision does not require uniform price differentiations to be extended to all customers under § 2(b). *See also Cadigan* v. *Texaco, Inc.,* 492 F.2d 383, 386 (9th Cir. 1974).

this Court has held that Section 2(b) prohibits uniform price reductions, and permits only price reductions designed to respond to the individual competitive situations presented, *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945), or to protect "competitors in individual transactions." *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957).[38] Yet Paragraph D requires price differentiations to be extended on a uniform, statewide basis, an extension of price differentiations not tailored, as this Court has said the Act requires, to the individual competitive situation.[39] Thus, Paragraph D requires a geographic and blanket extension of price cuts which the Robinson-Patman Act prohibits. When, as here, there is a direct and actual conflict between a state and federal law, *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971), and when, as here, compliance with both the state and the federal statute is impossible, *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), the state statute, under the Supremacy Clause, cannot stand.[40]

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[38] In *FTC* v. *Sun Oil Co., supra*, 371 U.S. at 517, the Court said Section 2(b) "permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further," *quoting H.R. Rep. No. 2287*, 74th Cong., 2d Ses. 16 (1936).

[39] *See also Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 535 (5th Cir.) *cert. denied*, 414 U.S. 859 (1973); *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *affirmed after remand*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra*, 466 F.2d at 1176; *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Exquisite Form Brassiere, Inc.* v. *FTC*, 360 F.2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966).

[40] *Cf. Shell Oil Co.* v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976), in which the United States District Court for the Northern District of California invalidated a California statute which permitted a seller to grant a lower price to meet the equally low price offered by a competitor to an individual customer only if the same price reduction was granted to all other purchasers competing with the customer to whom the lower price was granted. In effect, that statute required uniform price reductions as does the Maryland statute. The district court found the statute unconstitutional because it frustrated the congressional purpose embodied in Section 2(b) of the Robinson-Patman Act to foster price competition and because it was in direct, actual conflict with the federal act. *See also Jones* v. *Rath Packing Co.*, decided March 29, 1977 (when —as is not true in this case—it would be possible to comply with a state law without triggering federal enforcement, the state requirement is consistent with federal law).



(2) The Maryland Act either limits the availability of the "meeting competition" defense (if the view of the court below of Section 2(b) is accepted) or enlarges its scope so greatly, by requiring uniform extension of price differentiations, that it requires a seller to violate Section 2(a) of the Robinson-Patman Act to comply with Paragraph D of the Maryland Act. Yet competition and the degree to which the national economy demand price competition and flexibility are areas in which Congress has fully expressed its policies in the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1-7, as amended, and in the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. § 12-27, as amended by the Robinson-Patman Act. In either case, the Maryland legislature by virtue of Paragraph D, has interposed itself into the area—price competition and the protection of small business enterprises—where Congress has already struck a balance of the competing interests.[41] Paragraph D necessarily disturbs the balance Congress has set, by either narrowing or enlarging the scope of Sec-

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[41] *See generally* Department of Justice, *Report on the Robinson-Patman Act* (1977).

tion 2(b). State statutes which interfere with, or are contrary to the laws of Congress are invalid under the Supremacy Clause, *Gibbons* v. *Ogden,* 22 Wheaton 1 (1824), as are state statutes which stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

(3) The Robinson-Patman Act prohibits price differentials only where the effect may be substantially to lessen competition, to tend to create a monopoly, or to injure competition.[42] Paragraph D of the Maryland Act prohibits price differentials without regard to injury to competition.[43] Thus, the two statutes clearly conflict.

This Court is the appropriate forum to determine what is the proper scope and meaning of Section 2(b). It is also the appropriate forum to determine whether there is a conflict between the Maryland Act and the Robinson-Patman Act, and whether the latter preempts the former. These important questions, raised by the decision below, warrant plenary review by this Court.

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[42] The court below did not deal with this issue.

[43] In *Shell Oil Co.* v. *Younger,* 1976-1 Trade Cases, (CCH) ¶ 60, 960 (N.D. Cal. 1976), *appeal docketed,* No. 76-2784 (9th Cir. Aug. 13, 1976), a similar California statute which prohibited price differentials without regard to competitive injury was held invalid under the Supremacy Clause.



## CONCLUSION

**The questions presented by this appeal are substantial and warrant and require review by this Court. For this reason, probable jurisdiction of the appeal should be noted.**

**Respectfully submitted,**

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**July, 1977**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-10

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY,
*Appellants,*

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

## OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

**[FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION]**

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Respondents, Marvin Mandel, Governor of the State of Maryland, Francis B. Burch, Attorney General of Maryland and Louis L. Goldstein, Comptroller of the Treasury, by their attorneys, Francis B. Burch, Attorney General, Jon F. Oster, Deputy Attorney General and John A. Woodstock, Assistant Attorney General hereby file objection to the motion by Champlin Petroleum Company, *et al.* (hereinafter referred to as

"petitioners"), for leave to file a brief *amici curiae*, in support of Appellants' jurisdictional statement. Respondents' objection is based on the following grounds:

1. As disclosed by petitioners' motion, two of the three issues which petitioners seek to discuss in their brief *amici curiae* have already been presented to this Court by the six appellants which have filed appeals and docketed Jurisdictional Statements. To the extent that petitioners' interests may be pertinent to the Commerce Clause and Robinson-Patman issues, their argument, at best, is redundant and duplicative of the treatment and consideration of these issues by the appellants.[1] For respondents to be put in the position of having to answer petitioners' arguments on these issues would unnecessarily cause additional briefing and would distract both counsel and the Court from proper consideration of the other issues involved in this case.

2. It is submitted that petitioners' motion, as it relates to both the Commerce Clause and Robinson-Patman issues, does not present any factual or legal issues that have not and will not be comprehensively represented by the appellants in this proceeding. Appellants' counsel have consistently demonstrated exceptional expertise in their treatment of these issues in this case. Under these circumstances, petitioners have failed to demonstrate that their participation

[1] In addition to the appeal and Jurisdictional Statement by Exxon Corporation and Phillips Petroleum Company, No. 77-10 (Sup. Ct. July 1, 1977), see the following, all of which deal with one or both of these issues: *Shell Oil Company v. Governor of the State of Maryland, et al., appeal docketed*, No. 77-11 (Sup. Ct. July 1, 1977); *Continental Oil Company, et al. v. Governor of Maryland, et al., appeal docketed*, No. 77-12 (Sup. Ct. July 1, 1977); *Gulf Oil Corporation v. Governor of Maryland, et al., appeal docketed*, No. 77-47 (Sup. Ct. July 8, 1977); *Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc. and Petroleum Marketing Corporation v. Governor of Maryland, et al., appeal docketed*, 77-64 (Sup. Ct. July 11, 1977).



would in any manner be necessary to, or enhance, the eventual disposition of these two issues and this case.

3. Petitioners' remaining interest, in the alleged conflict between Paragraph (F) of the Maryland statute and the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 *et seq.*, is no more than a remote interest in one of several issues involved in the proceedings below which for good reasons, appellants apparently felt should not be presented to this Court.

4. As noted in the decision below (App. A, 32a),[2] the State of Maryland readily conceded that it could "not order allocation of petroleum products in conflict with the federal regulations enacted pursuant to the Emergency Petroleum Allocation Act" or promulgate regulations pursuant to any State law "which would conflict with present or future federal regulations." Recent decisions of this Court dictate that any enforcement of Paragraph (F) done in harmony with the federal statute would be proper, the operation of both reconciled so as to avoid preemption. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). The mere possibility of conflict is not sufficient to void state legislation. *DeCanas v. Bica*, 424 U.S. 351 (1976); *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470, 491-492 (1974); *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973).

5. It is therefore submitted that petitioners have not demonstrated any factual or legal issues that have not or will not be comprehensively represented by the appellants, nor presented any issue which should be, but has not been, fully presented to this Court. Petitioners have failed to demonstrate that their participation would in any manner enhance or be necessary to the eventual disposition of this case.

[2] Reference here is the Joint Appendix To Jurisdictional Statements filed by the appellants.

For the foregoing reasons, petitioners' motion should be denied.

Respectfully submitted,

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COMMONWEALTH OIL REFINING COMPANY, INC.
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On Appeal from the Court of Appeals of Maryland

## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42, for leave to file a brief *amicus curiae* in support of Appellants. This motion is necessitated by the refusal of the Appellee to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae,* the Chamber of Commerce of the United States of America, is set forth in detail in its brief. To summarize, the Chamber of Commerce is the largest business federation in the United States, representing both large and small enterprises, businessmen and women, throughout the United States, including the State of Maryland. The Chamber's membership includes representatives of virtually all vertically integrated industries, as well as those industries which utilize multiple retail distribution mechanisms, both company-operated and franchised.

The determination of the Court of Appeals of Maryland that the Motor Fuel Inspection Law, codified in the Maryland Annotated Code (1957), Art. 56, § 157 E (1972 Repl. Vol., 1976 Cum Supp.), does not violate

[1] Appellants have consented, pursuant to Supreme Court Rule 42.



the Commerce Clause of the United States Constitution (Art. I, § 8, Clause 3) is of broad-sweeping national significance and thus of grave concern to the Chamber and its members.

First, the Maryland statute, if upheld, will have a pronounced impact upon interstate commerce. Both the flow of petroleum products into Maryland and the marketing of these products and allied services in Maryland will be directly affected. Consequently, purchasers of petroleum products and related services, whose livelihoods are dependent upon their ability to transport persons and products in interstate commerce through Maryland, will bear the burden of any increased costs which would result from the enforcement of this law.

Second, during the last four years, the legislatures of thirty-three jurisdictions have adopted, considered, or had as pending business, proposals which are markedly similar, if not identical, to the statute at issue here. It is not mere idle speculation that, unless this Court reverses the determination of the court below, these other jurisdictions will enact their own versions of the Maryland statute. The potential for chaos in the economical and efficient marketing of petroleum products and related services throughout the United States, and the resultant adverse effects upon purchasers, is no less than astounding.

Third, and perhaps most importantly, the Chamber views this case as one whose impact far exceeds the confines of the petroleum industry. There are at least seventeen (17) major industries or industry groupings, with annual sales in excess of $238 billion, which market their goods and services through company-operated and franchised retail outlets. A mere extension of the

Maryland statute could directly and materially affect any or all of these industries.

The Chamber of Commerce, as the representative of a broad cross-section of American business, commands a vantage point which no other organization possesses; namely, the Chamber can assess the impact of this statute from the view of the affected industry, the affected business purchasers, and other industries which may be affected by similar legislation. As *amicus curiae*, we respectfully submit that the views of the Chamber of Commerce, a national business organization, are appropriate for consideration by this Court.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of Appellants be granted.

Respectfully submitted,

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On Appeal from the Court of Appeals of Maryland

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

## STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America [hereinafter the Chamber] is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 1615 H Street, N.W., Washington, D.C. 20062.

The Chamber is the largest business federation in the United States, with a total membership in excess of 69,000 enterprises and organizations representing businessmen and women throughout the United States, including the State of Maryland. More than 3700 state and local chambers of commerce and trade associations are members. Direct business memberships number in excess of 65,000, the overwhelming majority of which are corporations.

Unlike any trade association, the Chamber represents a broad cross-section of the American business community. Consequently, the Chamber's members include both vertically and horizontally integrated enterprises, and industries which have multiple methods of distribution of their goods and services, including company-operated and franchised retail outlets.



The interest of the Chamber and its members is rooted in the potential impact of this case as precedent which will determine the future availability and cost of petroleum products and allied services within the State of Maryland. Consequently, purchasers of these products and services, including business purchasers whose livelihoods are dependent upon their ability to transport persons and products in interstate commerce through Maryland at reasonable costs, are directly affected by the statute at issue here.

In addition, during the past four years, the legislatures of thirty-two other jurisdictions [1] have adopted, considered, or had as pending business, proposals which parallel or are identical to the statute under consideration here. The precedent established by the court below, unless overturned by this Court, will, in all probability, serve as the "green light" for the passage of similar legislation in other states. Thus, the disposition of this case will, factually if not legally, have a nationwide impact.

The spectre of divestiture statutes of this kind in a multitude of states directed at the petroleum industry is of substantial concern to the Chamber and its membership. Specifically, the relationship of the business community nationally as consumers of petroleum products will be directly and adversely affected. And, any disruptions of the market system inherent in the Maryland statute [2] will be exacerbated and geometri-

[1] For a complete listing of the jurisdictions in question, *see* n. 9, *infra* at 7.

[2] For examples of the disruptions which the Act would cause in Maryland, *see* 9-12 *infra*.

cally compounded if 32 other variations of the same statute were adopted by 32 different jurisdictions.[3]

Finally, this case is not a parochial issue affecting only the petroleum industry. At issue is the very existence of a dual market structure, in which company-operated retail outlets exist and compete side-by-side with franchised dealers. In this respect, the instant controversy may be viewed by future legislatures, legislators, and commentators as a basis for extending similar divestiture statutes to other industries.[4]

This case is not only dispositive of whether the Act in question violates the Commerce Clause of the Constitution (Article I, § 8, Clause 3). In the view of the Chamber, this case may also determine whether similar statutes are on firm constitutional footing, and, thus, whether they may be employed to invidiously discriminate against and deleteriously affect any industry which utilizes a dual marketing system.

## REASONS FOR NOTING PROBABLE JURISDICTION

For more than 150 years, this Court has regarded the Commerce Clause of the Constitution (Art I, § 8, Clause 3) as an instrument to promote the orderly flow of commerce among the States in a "spirit of harmony and conciliation" and to preclude undue burdens on interstate commerce. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 206 (1824). *See Simpson* v. *Shepard,* 230

[3] The volume of fuel used nationally in 1975 for commercial transportation is discussed in n. 15, *infra* at 10.

[4] The implications of this case *outside* the petroleum industry are particularily troublesome to the Chamber and are discussed at n. 11 and n. 12, *infra* at 8 and 9, and the accompanying text.



U.S. 352, 398-400 (1913); *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 523 (1924); *Parker* v. *Brown,* 317 U.S. 341, 360 (1943); *McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 330-331 (1944); *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946); *H.P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 533-534 (1949).

Indeed, no one was more afraid of "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation", *Baldwin, supra,* at 522, *citing* Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 584; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259, than the authors of the Commerce Clause, who strove to eliminate discriminatory practices between the States.[5]

The Motor Fuel Inspection Law, as amended, Md. Ann. Code (1957), Art. 56, § 157E (1972 Repl. Vol., 1976 Cum. Supp.) [hereinafter the Act],[6] upheld by

[5] One commentator has noted that *Gibbons* "made the Constitution legally accomplish what was the moving cause of the adoption of the Constitution in the Constitutional Convention—'to keep the commercial intercourse among the states free from all invidious and impartial restraints.'" Willis, *Gibbons* v. *Ogden Then and Now,* 28 KY. L. J. 280 (1939). For a general discussion of the early history of the Commerce Clause, *see also* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 MINN. L. REV. 432 (1941); Lay, *The Commerce Clause and the Constitution—Its History and Development,* 60 AM. L. REV. 161 (1926); Fletcher, *Some Aspects of the Commerce Clause,* 3 MISS. L. J. 136 (1930); Vaught, *The Commerce Clause of the Constitution,* 21 A.B.A. J. 153 (1935).

[6] The Act, in pertinent part, reads as follows:

"(B) After July 1, 1974, no producer or refiner of petroleum products, shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and

the Court of Appeals of Maryland, prohibits the ownership and operation of retail service stations by producers and refiners. Consequently, the Act functions as an anticompetitive bar to the orderly and economical flow of petroleum products in interstate commerce by creating a special economic advantage which favors in-state dealers of these products and related services.[7] As a result, the Act directly contravenes the long established principle that state statutes shall not operate in a discriminatory manner. *See Hunt* v. *Washington State Apple Advertising Comm.*, —— U.S. ——, 45 U.S.L.W. 4746, 4751 (1977); *Great Atlantic & Pacific*

operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any persons, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealers."

Md. Ann. Code (1957), Art. 56. § 157 E (1972 Repl. Vol., 1976 Cum. Supp.)

[7] The Act also mandates in subparagraph (D) that:

Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

The Chamber, as *amicus*, shares the belief vigorously expressed by several Appellants in their respective Jursdictional Statements that this provision runs afoul of the "meeting competition" defense permitted under the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.* (1976). For the reasons so persuasively set forth by Appellants, the Chamber urges this Court to note probable jurisdiction with respect to both questions presented.



*Tea Co.* v. *Cottrell*, 424 U.S. 336 (1976); *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951); *H.P. Hood & Sons, Inc.* v. *Du Mond, supra; Baldwin* v. *G.A.F. Seelig, Inc., supra; Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

In its broader implications, the Act is the precursor of even more pernicious disruptions of an industry which is critical to the well-being of the entire economy.[8] During the last four years, the legislatures of 33 jurisdictions,[9] including the State of Maryland, have

[8] The interrelationship of the petroleum industry and other principal industries is undisputed. For example, the National Council of Farmer Cooperatives has estimated that 90% of the energy requirements of the food and fiber production industries is provided by petroleum products and natural gas. Statement by Bill Brier, Director of Energy Resources, National Council of Farmer Cooperatives, *Effects of Divestiture Legislation on Food and Fiber Production* 2 (1976).

The airline industry would also incur increased costs if the marketing structure of the petroleum industry were disrupted. These costs would result from having to deal with many different companies in order to obtain the same amount of fuel, as well as the necessity of assuming responsibility for quality control, which is currently handled by fuel suppliers themselves. Letter from Donald J. Lloyd-Jones, Sr. Vice President, Operations, American Airlines, to all Members of the United States Senate, concerning S.2387, the Divestiture Bill, June 21, 1976.

While the Maryland statute at issue here is limited to the retail service station market, the underlying principle of the Act—namely, that state legislatures may prohibit the retail marketing of petroleum products by producers or refiners—is applicable to the entire gamut of petroleum products which are marketed or may be marketable by franchised dealers.

[9] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee,

adopted, considered, or had as pending business, proposals which parallel or are identical to the statute at issue here.[10] It is reasonable to assume that, unless the decision of the court below is overruled by this Court, many, if not all, of these jurisdictions will enact their own versions of this legislation. The result may very well be a disruption of the orderly flow of commerce on a truly national scale.

Further, the compulsory disengagement of a dual marketing structure, eliminating company-operated retail outlets to the economic advantage of in-state franchisee-operated retail service stations, if permitted in the petroleum industry, might then be attempted in industries which employ similar marketing structures.[11] Many of these industries are vertically integrated.[12] Consequently, the ultimate disposition of the case at bar has the potential to affect a vast array of industries. Thus, the Chamber, as *amicus curiae,* urges this Court to view this case not only from the perspective of the companies directly affected, but also in its broader ramifications outlined above.[13]



The anticompetitive effects of this statute upon interstate commerce were graphically demonstrated to the trial court below. Indeed, Appellants, Petroleum Marketing Corporation, Kayo Oil Company and Ashland Oil Inc., presented persuasive testimony that they may be forced to abandon their retail marketing operations in the State of Maryland if the Act were in effect. (E. 388, E. 396, E. 457, E. 492.)[14] In each instance, the witnesses explained that only through company-operated facilities, as part of an integrated production-distribution system, could costs be closely monitored

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Vermont, Washington and West Virginia. The Florida law (Fla. Stat. §526.151) was declared unconstitutional in *Exxon Corp.* v. *Conner*, No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon City., Fla. Jan. 23, 1975). The Delaware statute (Del. Code, Title 6, § 2905-06 (1976 Cum. Supp.)) is presently the subject of litigation.

[10] The proposals would either prohibit or limit company-operated retail service stations, require uniform statewide pricing on allowances, or both.

[11] The Department of Commerce lists 17 major categories of goods and services which are available to the American public through dual distribution marketing programs involving both company-operated and franchisee-operated retail outlets. For 1977, the Department estimates that there exists a total of 463,482 such establishments, 87,127 of which are company-operated. The balanced, 376,355, are franchisee-operated. These establishments account for a total sales volume of over $238 billion. The company-operated outlets account for some $36 billion in sales, compared to over $202 billion for the franchisee-operated outlets. The types of business range from automobiles and truck dealers to those which provide business aids and services, to retail food outlets. U.S. Department of Commerce, FRANCHISING IN THE ECONOMY 1975-77, at 26 (Dec. 1976).

[12] New statutes similar to the Act at issue here could be enacted to cover fast food restaurants, soft drink bottlers, automobile and truck dealers, automotive parts and services and non-food retailers, and other partially or totally integrated industries.

[13] Not only does this suit present a substantial federal question on its facts, but also it raises significant economic considerations.

The economic validity of vertical integration as a structural tool of industrial organization and the relative efficiencies which it produces are challenged by any attempt to compel divestiture, as typified by the Maryland Act at [illegible] here. Vertical integration serves to reduce, among others, [illegible]tion costs and research costs, and to assure security of sup[illegible]hich also serves to reduce costs by assuring continuity of operations. L[illegible]ler, *Integration and Competition* in VERTICAL INTEGRATION IN THE OIL INDUSTRY, 7-20 (E. Mitchell ed. 1976). It is precisely these lower operating costs of integrated companies that higher cost competitors find discomforting.

[14] "E" references are to the Joint Record Extract prepared for the Court of Appeals below.

and low prices offered to consumers. Under the Maryland Act, however, the private brand companies would be compelled to divest their retail outlets. Costs would thereby be increased to consumers, and the companies themselves would be forced out of the business when effective price competition could no longer be maintained. (E. 400.) The withdrawal of these companies from the market would only exacerbate an already aggravated situation by reducing competitive price pressures on the remaining service stations, thus forcing prices up even further. (E. 509-510.) to the detriment of all consumers.[15]

In addition, the Act would operate to discourage new private brand integrated companies from entering the State since dealer-operated stations are simply too unprofitable and inefficient. (E. 510.)

Finally, the Act would prohibit marketers who are not yet producers or refiners from engaging in "backwards integration." This ban on integration operates as a barrier to market entry both from the perspective of the refining of crude products and from the standpoint of retail competition. (E. 402.) Hudson Oil Company, for example, will either be precluded from acquiring any refinery or be forced to abandon its retail operations if the Act is upheld. (E. 500.)

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[15] During 1975, commercial vehicles (trucks over 10,000 pounds in gross vehicle weight) used 18.2 billion gallons of the nation's fuel. U.S. Department of Transportation, INTER-AGENCY STUDY OF POST-1980 GOALS FOR COMMERCIAL MOTOR VEHICLES VI-13 (June 1976). The national impact of the adoption by state legislatures of statutes similar to the Maryland Act, with the concomitant predicted rise in prices, would substantially affect the cost of the transportation of persons and products in interstate commerce.



In light of these dramatic facts, the State of Maryland is hard-pressed even to suggest that the Act at issue is merely a local statute regulating local activities. Indeed, the Court of Appeals' reliance upon *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U.S. 129 (1921) (App. A at 20a-22a) in finding no violation of the Commerce Clause is sorely misplaced. As Mr. Justice Clarke noted, the issue in that case was whether a product of local industry was "rendered an instrumentality of interstate commerce" by the fact that it was subsequently shipped out of state. 257 U.S. at 135.

In determining whether a suspect activity impacts upon interstate commerce, the Court will look both to the interstate sources of the product and the number of interstate travelers patronizing the businesses. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 302 (1964); *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 309-310 (1964); *see also Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Daniel* v. *Paul*, 395 U.S. 298 (1969); *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *see generally, Perez* v. *United States*, 402 U.S. 146, 153 (1971); *United States* v. *Women's Sportswear Mfrs' Ass'n*, 336 U.S. 460, 464 (1949).

In the instant case, since no crude oil is produced or refined in Maryland (App. A at 19a), the product to be regulated at the retail market is already in the stream of interstate commerce when it enters the State. In addition, interstate travelers using Maryland's roads purchase these products. (App. D at 62a, 81a.) Thus, the Act, as Appellants demonstrated at trial, has a direct impact upon interstate commerce.

These egregious infringements upon the free flow of products in the stream of interstate commerce are even more offensive because they effectively discriminate against foreign (i.e., non-Maryland) companies and favor local (i.e., Maryland) dealers. As previously noted, this Court has consistently condemned state statutes which have the "principal effect of not only burdening interstate sales . . . but also discriminating against them." *Hunt* v. *Washington State Apple Advertising Comm.*, —— U.S. ——, 45 U.S.L.W. 4746, 4751 (1977).

In the instant case, this discrimination takes at least three forms. First, by requiring producers and refiners who desire to market their products in Maryland to convert their company-operated retail outlets to dealer-operated outlets, the marketing costs of the producers and refiners will increase. Second, the statute has the effect of stripping away the competitive advantage, detailed above, which the "private brand" Appellants enjoy by virtue of their integrated structure. Third, the statute provides a concomitant advantage to local dealers who are neither required to expend money to alter their marketing structure nor lose any competitive advantage by virtue of compulsory divestiture.[14]

In sum, then, the Act stands in clear violation of the principle enunciated by the Court in *Polar Ice*

[14] That less restrictive means are available to the State of Maryland to protect the economic welfare of local dealers without discriminating against foreign competitors is carefully articulated in the Jurisdictional Statement filed by Appellants Exxon Corporation and Phillips Petroleum Company.



*Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964), that Maryland "may not, in the sole interest of promoting the economic welfare of its [dealers], insulate the [Maryland retail fuel] industry from competition from other states." *Id.* at 377.

Thus, the Act impermissibly "neutralize[s] the economic consequences of free trade among the states", *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 522-523, by compelling out-of-state competitors to engage in less efficient, more costly activities, thereby protecting local businesses to the detriment of consumers and real or potential out-of-state competitors.

## CONCLUSION

For the reasons set forth above, we urge the Court to note probable jurisdiction.

Respectfully submitted,

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